

BEFORE THE
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

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DOCKET SECTION

QA 28709

Motion of

UNITED AIR LINES, INC.

for Confidential Treatment
under Section 302.39

Docket OST-95-675 - *27*

MOTION OF UNITED AIR LINES, INC.
TO WITHHOLD INFORMATION
FROM PUBLIC DISCLOSURE

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DATED: November 7, 1997

BEFORE THE
DEPARTMENT OF TRANSPORTATION
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Pursuant to Rule 39(e) of the Department of Transportation, Office of the Secretary Procedural Rules, United Air Lines, Inc. ("United") hereby files this Motion to Withhold From Public Disclosure the information contained in a sealed envelope and captioned Schedule B-7 Airframe and Aircraft Engine Acquisitions and Retirements and delivered to the Office of Aviation Transportation Management. This information is provided pursuant to Part 241 of the Department's Economic Regulations, 14 CFR 241, and is part of Form 41 Schedule B-7.

The information sought to be withheld from public disclosure details United's acquisition cost and sales realization amounts with respect to new and used aircraft and aircraft engines, each broken down by model, individual serial number, and individual purchase or sale prices. The information for which United seeks confidential treatment under this instant Motion is similar to and consistent with that for which the Department granted, in 1993 and 1994 orders, confidential treatment to similar Schedule B-7 data filed separately by United, American Airlines, Inc. ("American") and Delta Air Lines, Inc. ("Delta").

The information sought to be withheld falls within Exemption 3 of the Freedom of Information Act (5 U.S.C.

552(b)(3)), which exempts from disclosure information required by statute to be withheld. Exemption 3 provides that:

"(b) This section does not apply to matters that are. . .

* * * * *

(3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;"

Section 1104 of the Federal Aviation Act of 1958, as amended (the Act), provides that:

"Any person may make written objection to the public disclosure of information contained in any application, report, or document filed pursuant to the provisions of this Act . . . stating the grounds for such objection. Any information contained in such application, report, or document . . . shall be withheld from public disclosure by the . . . Secretary of Transportation . . . if disclosure of such information would . . . adversely affect the competitive position of any air carrier in foreign air transportation."

United considers the requested information deleted from Schedule B-7 to be highly sensitive and confidential. The air transportation industry, both domestically and internationally, has become highly competitive. Aircraft ownership costs are a major cost of doing business for all certificated carriers. A carrier's ability to reduce its aircraft ownership costs relative to its competitors can, therefore, provide a carrier a significant competitive advantage. In an effort to secure such an advantage, United applies considerable management resources to trying to reduce its aircraft ownership costs. This includes devoting substantial resources to trying to obtain airframes and engines at the lowest possible acquisition cost and disposing of these assets at the highest possible sales price. Moreover, the negotiations for new equipment are made more difficult by the

fact that there are only three manufacturers of large jet airframes and only three of large jet engines. However, as long as the Department makes available to the public United's acquisition cost for each airframe and engine it acquires and the sales proceeds realized on each sale of such equipment, United is denied the benefit of these efforts, harming United commercially.

Once United's costs are divulged, United's competitors can use these cost data to negotiate contract price adjustments from the same suppliers United is using or from competing suppliers. Since many of these competing carriers are foreign flag carriers, their equipment prices will never be reported to the Department, let alone be made public. It is not only commercially damaging but basically unfair to United and all other U.S. carriers to require them to divulge to their non-reporting foreign flag competitors the fruits of their competitive efforts with manufacturers to secure the best possible purchase price. See, e.g., Order 81-12-9.

The disclosure of United's purchases and sales of individual aircraft and aircraft engines would allow competing foreign and domestic airlines, manufacturers of aircraft and engines, and new and used aircraft owner/lessors to calculate and closely track United's costs to expand and operate its various fleets of new model B777-222, B747-422, and A320-232 aircraft, (and related new engines), to acquire off of lease its used DC 10-10 aircraft, and to reduce or dispose of its various fleets of used model B747-122, DC10-10, and B737-222 aircraft (and related used aircraft engines). It would adversely affect United's competitive position by strengthening the bargaining position of other airlines, including foreign airlines, and aircraft owner/lessors seeking to purchase aircraft equipment from manufacturers and others. They would be able to use their knowledge of United's confidential purchase and sale arrangements as starting points in their own negotiations, and thus improve their ability to obtain equal or more favorable prices. This would lead to United's competitors, including foreign competitors, being able to enjoy lower capital costs than otherwise the case, and to their being able to operate and compete more efficiently with United than otherwise.

United submits that FOIA Exemption 3 is applicable, as a result of the provision in Section 1104 of the Act requiring the withholding from public disclosure of any information contained in a report filed pursuant to the Act, if such disclosure would "adversely affect the competitive position of

any air carrier in foreign air transportation" (49 U.S.C. App. 1504). The information for which United seeks confidential treatment under this instant Motion is similar to and consistent with that for which the Department granted confidential treatment, in (i) a March 29, 1993 order concerning similar Schedule B-7 data filed by Delta, (ii) a November 1, 1993 order concerning similar Schedule B-7 data filed by American, (iii) a December 29, 1993 order concerning similar Schedule B-7 data filed by United, (iv) an August 23, 1994 order concerning similar Schedule B-7 data filed by Delta, and (v) a November 18, 1994 order concerning similar Schedule B-7 data filed by United. The Department's grants of confidentiality were specifically made under Exemption 3 (and its 1993 grants were made exclusively under Exemption 3) since Delta and American, like United, compete with foreign air carriers who do not file such information yet are free to obtain U.S. carrier information from the Department. The Department there stated:

"[t]his lack of reciprocal access, the Department believes, could substantially harm the competitive position of American, resulting in the erosion of the U.S. international airline industry."

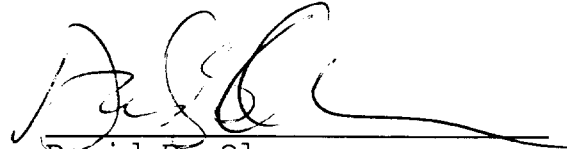
United also submits that the information sought to be withheld falls within exemption 4 from the Freedom of Information Act, 5 U.S.C. 552(b)(4), which provides protection from disclosure for "trade secrets and commercial or financial information obtained from a person and privileged or confidential;..." United believes the requested information deleted from Schedule B-7 clearly satisfy all three elements required for protection under Exemption 4. First, the acquisition cost and sales realization amounts reported are substantially the same as negotiated between the parties, which purchase and sale prices are clearly financial or commercial in nature. Second, United established these prices through its negotiations with private third parties; the information was not obtained from any governmental entities. Third, the disclosure of such information would harm United's competitive position. See Gulf & Western Indus., Inc. v. United States, 615 F.2d 527 (D.C. Cir. 1979), National Parks & Conservation Ass'n v. Morton, 498 F.2d 765 (D.C. Cir. 1974), Sterling Drug, Inc. v. Federal Trade Comm'n, 450 F.2d 698 (D.C. Cir. 1971), The Tinken Co. v. U.S. Customs Service, 491 F.Supp. 557 (D.C. Cir. 1980), Braintree v. Dept. of Energy, 494 F.Supp. 287, and Burke Energy Corp. v. Department of Energy, 583 F.Supp. 507 (D. Kan. 1984). Finally, the Department's 1994 grants of confidentiality (i.e., its August 23, 1994 order concerning similar Schedule B-7/B-43

data filed by Delta, and its November 18, 1994 order concerning similar Schedule B-7 data filed by United) were specifically made under both Exemptions 3 and 4.

The Department, when deciding United's (and American's and Delta's respective) prior B-7 confidentiality motions, granted a ten-year confidential period beginning on the date the information was required to be filed pursuant to 14 CFR 241.22(a). United deserves to be treated no less favorably with respect to the sealed Schedule B-7 attached hereto.

WHEREFORE, United requests that the Department, pursuant to Rule 39 of its Rules of Practice and Exemptions 3 and 4 of the Freedom of Information Act, withhold from public disclosure, the price information contained in the Airframe and Aircraft Engine Acquisition and Retirements items which have been deleted from columns 9, 10 and 11 of the public filing of United's quarterly Form 41 Schedule B-7 report, respectively, for a period of not less than ten years.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'D. Olausen', is written over a horizontal line.

David B. Olausen
Senior Counsel
UNITED AIR LINES, INC.

DATED: November 7, 1997